

Addendum to the Final Convening Report:  
Negotiated Rulemaking Committee on  
Bureau of Indian Affairs-Funded School  
Facilities Construction

Explanation of Table 2: Assigning  
Committee Membership By Proportionate  
Share Of Students And Need For Diversity

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This addendum is written to provide additional explanation of the basis for Table 2 of the Final Convening Report for the No Child Left Behind School Facilities Construction Negotiated Rulemaking (see report “Recommendations” section, attached, and the table on Page 5 below). This table was an attempt by the convening team to develop a clear, transparent rationale for assigning seats for tribal members on the Negotiated Rulemaking Committee. This chart was included in the draft Convening Report and all interviewees, schools, and Tribes were provided the opportunity to comment on the draft.

The chart was developed as follows.

- The NCLB Act states: “ensure, to the maximum extent possible, that the tribal representative membership on the committee reflects the proportionate share of students from tribes served by the Bureau-funded school system.” Consequently, CBI used the proportionality requirement to assign most of the seats. Based on the enrollment figures for 2006 (most recent figures available at that time), CBI determined the number of students from each tribe and calculated the percentage of total BIE enrollment attributable to each tribe (number of students per tribe divided by the total number of students served by all BIE-funded schools). For example, a tribe with 1,235 enrolled students out of 49,761 total students served would have a proportionate share of 2.48% of the students. Tribes were then listed by number and percentage of students enrolled.
- The Federal Advisory Committee Act allows for up to 25 seats on rulemaking committees. The Committee is expected to have twenty (20) seats for Tribes and five (5) seats for federal representation. The proportional allocation of seats was determined by multiplying the percent enrollment by twenty seats. For example, if a tribe serves 2.48% of total students, their proportionate representation would be  $2.48 \times 20$ , or 0.62.
- The calculation of every tribe’s proportional representation resulted in the allocation of fractions of seats (i.e. .6 versus 1 for instance). When the calculation resulted in a proportional allocation greater than 0.6, the result was rounded to the next highest whole number, and the tribe was assigned that number of seats on the Committee. However, the many tribes with a proportional allocation less than 0.6 required a method of allocating the few remaining seats to the many remaining tribal interests. One option would be simply to assign a single seat to each of the largest remaining tribes. However, this would have minimized the total number of tribes represented on the Committee. In order to accomplish the broadest representation on the committee, CBI recommended a different option. It was observed that several tribes had similar values for their fractional allocation. CBI grouped together tribes with similar proportions who also shared geographical and/or tribal affiliation in order for CBI’s suggested approach to work, the grouped tribes would have to agree to share a representative. These shared representatives must be capable of representing in good faith the interests of more than one tribe. These groupings are not meant to dictate the final seat distribution or to require that these particular tribes share seats with each other; rather, they were offered as an initial suggestion of how to meet the Congressional mandate of proportionate

representation while including as many of the tribes with large numbers of students as possible. This grouping resulted in a total of 21 rather than 20 seats.

- If 21 seats are allocated according to the proportionate share approach, 75% of the total number of enrolled students, their schools, and tribes would be represented. However, 25% of students served by other tribal schools would not be represented. Thus, while 75% of students served would be represented, because of the large number of smaller schools and tribes, 220 tribes would have no direct representation. In order to increase representation, within the constraints and requirements of the No Child Left Behind Act, the Federal Advisory Committee Act, and the Negotiated Rulemaking Act. CBI proposed that the Department of the Interior add five to seven seats to the committee. This is legally feasible under FACA.
- CBI was uncertain how to help the numerous unrepresented tribes best organize themselves, and concluded that they should be encouraged to organize by association, region, or geography to nominate a representative as the tribes see fit. Under this approach, the Bureau would leave these nomination decisions to the discretion of the tribes individually or collectively. While the Secretary of the Interior has full discretion, as provided by law, to appoint members to the committee, the tribes would have an active and broad opportunity to shape the potential makeup of the committee through nominations.
- In order to allocate these five to seven additional seats, CBI recommended that the Department be guided by the following principles in choosing among nominations to provide for the broadest and most balanced representation possible. These include:
  - Seek representation for Tribes served by Bureau-funded schools not represented by the tribes allocated seats according to share of student enrollment.
  - Seek representatives who will help to increase the geographic diversity of representation on the committee.
  - Seek representatives who will help to increase the diversity of types of schools represented (i.e, off-reservation boarding schools, dorms, and schools serving multiple tribes)
  - Seek representatives who might be nominated by multiple tribes and have ability to coordinate and represent a coalition or group of like-minded tribes and schools.
  - Seek representatives of regional or national Indian Education organizations.
- Recognizing that each and every child needs and deserves a quality education in safe and comfortable surroundings, it is worth noting the following from the 2006 enrollment numbers. Out of 242 tribes served by BIE-funded schools:
  - 132 tribes have 1-19 children enrolled
  - 24 tribes have 20-49 children enrolled
  - 18 tribes have 50-99 children enrolled
  - 68 tribes have 100 or more children enrolledThe committee must not lose sight of its responsibility to protect the interests of the 174 tribes that have fewer than 100 children enrolled in the education system.



## **VI. RECOMMENDATIONS**

The section below details our draft recommendations, based on our interviews, regarding regulatory negotiation pertaining to the repair, renovation, and replacement of BIE-funded schools.

### **A. INITIATE THE REGULATORY NEGOTIATION (REG NEG)**

In our best professional judgment, we conclude that a consensus-based negotiation to develop proposed regulations should be initiated. This recommendation is based on the following rationale (and further detailed according to the Negotiated Rulemaking Act in the section above).

- The regulatory negotiation has been mandated by law and is clearly detailed in the No Child Left Behind Act.
- Almost all interviewees expressed a strong desire to have a say in and influence the prioritization and allocation of school construction funding.
- A regulatory negotiation will provide a formal, structured process for tribes and their representatives to engage with the Bureau on these issues.
- The issues for discussion are focused, specific, and narrow enough to be managed within a reasonable number of meetings over a reasonable period of time.
- Representatives of diverse schools and tribes can likely be convened (though full representation of all tribes remains a concern).

For the Bureau to establish a negotiated rulemaking committee, it must first issue in the Federal Register a Notice of Intent to Proceed with Regulatory Negotiation. Often, though not always, that Notice includes a rationale for the negotiated rulemaking, some general sense of its goals and objectives, and calls for nominations to a Committee. The public (tribes, schools, others) may comment on this Notice during a public comment period, and as nominations for Committee membership are sought in the Notice, tribes may nominate representatives to the potential Committee.

### **B. PROCEED WITH THE REGULATORY NEGOTIATION. OBTAIN SUFFICIENT FUNDING AND SEEK PUBLIC SUPPORT ON COMMITTEE MEMBERSHIP.**

Comments noted that NCLB requires that the regulatory negotiation occur, and that therefore, BIE should be required find the necessary funds to make it happen. The BIA should proceed with the regulatory negotiation, and work to obtain sufficient funds for a robust, inclusive, and thorough process. They also need to ensure that they convene a reasonably balanced Committee in the view of tribes and schools. In order for the process to be as robust, inclusive and thorough as possible, the process will not be inexpensive in terms of time, staff resources nor costs. Funding travel for representatives from across the country, possibly providing them resources to caucus with tribal representatives not at the table, organizing associated public outreach in tribal communities that will be needed to supplement a limited Committee membership, and covering the costs of mediation will be substantial. Without sufficient funding, the process will likely be too cursory, limited, and unsatisfying to most participants.

Second, the Bureau needs to put additional effort into ensuring that representatives of tribes, schools, and the public are able to accept the composition of the Committee. As noted in our discussion of the Negotiated Rulemaking Act criteria, we believe it is not fully possible to convene a practically sized, workable committee that fully allows complete representation *across all Tribes*. However, the NCLB spells out a formula for addressing this challenge, and thus, provides some guidance. Furthermore, we set forth additional recommendations below on how the Committee might be convened and structured to increase transparency, inclusion, and accountability. Comments on our draft recommendations on the distribution of seats for the Committee suggest that it should be possible to construct a “balanced, representative” committee, even if not all stakeholders are in full agreement on the detailed composition.

Once the Bureau determines the composition of the Committee from nominations obtained in response to the request in the Notice of Intent, the Bureau must work with the Department of the Interior, and the White House liaison, to obtain formal approval of the membership. The Secretary of the Interior then approves the final committee membership, designates a federal official to serve as the formal coordinator/point of contact for the process, and approves a charter that, among other things, defines: the Committee’s objectives and the scope of its authority; sets forth the estimated number and frequency of Committee meetings; and identifies the period of time necessary for the Committee to carry out its work. The White House approval process can take time (sometimes six to twelve months) to complete and is subject to the final and sole discretion of the White House (for membership), Secretary of the Interior (for membership and charter) and the Office of Management and Budget (for compliance with FACA). If the BIA ultimately decides to proceed, the final charter, Committee membership, and the date and location of the first meeting of the Committee are published in the Federal Register at least 15 days prior to the first meeting of the Committee.

Please note that it is our understanding that the typical reg-neg process does not require public comment on the final Committee composition (i.e., membership). However, given the complexity of convening a Committee for such diverse interests, we strongly encourage the Bureau to find a means through the Federal Register or other processes to allow tribes and schools to comment on the draft composition of the Committee.

### **C. ESTABLISH CLEAR AND ACHIEVABLE GOALS FOR THE PROCESS.**

The BIA, in conjunction with the BIE and tribes and schools should establish clear and achievable goals for the process. We encourage the BIA to offer a draft set of goals for the process in its Notice of Intent to Proceed with Negotiated Rulemaking (should the Bureau decide to implement these recommendations) and to take comment on such goals. We conclude that a regulatory negotiation on these issues might seek to reach several goals. First and foremost, the goal of all participants ought to be to improve the education of Native American children through improving school facilities in which they are educated by improving the system by which these facilities are repaired, renovated, and replaced. Second, the negotiation should strive to meet the goals laid out in the NCLB Act. These include reaching agreement on:

- Deciding how to address the call for a catalogue of the conditions of schools

- Determining formulas for priority and funding for school replacement construction and new construction
- Determining formulas for priority and funding for school renovation and repair;

Third, even if full agreement is not reached, we conclude that a negotiated rulemaking might also achieve the following additional goals:

- Increase the understanding of all participants/actors in the system, from local school officials to BIA and BIE staff, in how the overall process for facilities' funding practically and actually works;
- Increase the number of ideas and options for how to prioritize school facilities' funding generally by seeking the input of diverse parties who have a wealth of experience in seeking to manage and improve Indian school facilities;
- Increase dialogue among the disparate and diverse participants/actors within the overall BIE school system about the range of issues, challenges, and solutions facing school facilities' management, from the linkages of operations and maintenance budgets to OFMC-funded projects to the management and oversight of projects, contracts, and contractors; and
- Integrate negotiated rulemaking with broader tribal government and school engagement to create a process that better meets the unique needs of Native Americans.

#### **D. ESTABLISH A FAIR, STRUCTURED, AND TRANSPARENT CONVENING PROCESS FOR SELECTING TRIBAL REPRESENTATIVES.**

Given the NCLB Act, the information obtained in our interviews, and the challenges of convening a truly representative Committee among the diverse BIE schools, we recommend a specific, structured process for obtaining nominations for membership. We recommend the following process for convening the Negotiated Rulemaking Committee.

- The Bureau should seek nominations through a Notice of Intent to initiate negotiated rulemaking.
- The Bureau should lay out the general criteria for representatives:
  - With the exception of federal BIA, BIE, and DOI representatives, all representatives must be nominated by Tribes and done so via the official mechanisms of that Tribe for such decisions;
  - To the greatest extent possible, nominees should:
    - 1) have knowledge of school facilities and their repair, renovation, and construction (this may include knowledge and skills of construction project management, school facilities operation and management, construction cost estimation, education program space needs, budgeting and appropriation, engineering);
    - 2) be past or present superintendents, principals, facility managers, teachers, or school board members or direct experience with school construction projects;
    - 3) have the authority to represent tribal views, communicate with, and have a clear means to reach agreement on behalf of the tribe(s) they are representing;

- 4) be able to coordinate, to the extent possible, with other tribes and schools who may not be represented on the Committee;
  - 5) be able to negotiated effectively on behalf of their constituents;
  - 6) be able to commit the time and effort required to attend and prepare for meetings and,
  - 7) be able to collaborate among diverse parties in a consensus-seeking process.
- The Bureau should allow the Committee to exceed twenty-five members. The Federal Advisory Committee Act (FACA) requires that committees convened be no more than twenty-five members with some exceptions. However, we conclude that it is not possible to form a representative and balanced Committee without exceeding that number by some modest margin (6 to 8 seats). FACA allows an agency to waive this limitation with a rationale and we strongly encourage BIA to do so.
  - Once the draft membership is identified, the Bureau should ensure, as noted above, that tribes, schools, and the interested public have a chance to comment on the draft Committee composition to ensure that it is as reflective of diverse tribal interests as possible.

**E. TO THE MAXIMUM EXTENT POSSIBLE, ASSIGN TRIBAL SEATS ACCORDING TO THE PROPORTIONAL SHARE OF STUDENTS FROM TRIBES SERVED BY FEDERAL FUNDS.**

The NCLB Act states: “ensure, to the maximum extent possible, that the tribal representative membership on the committee reflects the proportionate share of students from tribes served by the Bureau-funded school system.” We recommend that the Bureau be specific about how they would assign seats according to this Congressional mandate, and seek nominations for these seats through the Notice of Intent to initiate a negotiated rulemaking.

Our proposal in the chart below, presented for the purpose of discussion and comment, is that the Bureau might assign twenty one seats to Tribes according to their proportionate share of students. Because the proportionate share of students, when allocated across 20 to 25 seats, quickly falls below “1” seat for numerous tribes (relatively few tribes represent the largest number of students), some tribes similar in affiliation or geography are grouped together for one seat. In general, the Bureau would leave nomination decisions to the discretion of the Tribes. Nominating tribes would seek to achieve internal consensus so that they nominate only the number of representatives for the seats allocated, thus assuring that the Bureau was not given any responsibility for selecting among nominees for a given seat.

The following chart seeks to assign Committee seats according to the Congressional mandate using student enrollment figures from 2006. The chart includes the tribes with the greatest number of students across the whole system, the percentage or proportion of students that these raw numbers represent, and how seats might be assigned for individual or “grouped” tribes (recognizing that tribes are autonomous, independent, sovereign entities and so tribes would have to either agree to nominate and thus share a representative across tribal jurisdictions or each at least have the opportunity to nominate a member for that particular seat). It also suggests seats for other tribes and tribal entities to maximize representation



**TABLE 2: ASSIGNING COMMITTEE MEMBERSHIP BY PROPORTIONATE SHARE OF STUDENTS AND NEED FOR DIVERSITY**

TRIBE	NUMBERS OF STUDENTS	% OF TOTAL STUDENTS	% TIMES 20 SEATS TOTAL	SUGGESTED SEATS
Navajo	17,545	35.26%	8.81	9
Oglala Sioux	3,701	7.44%	1.86	2
Turtle Mountain Chippewa	2,071	4.16%	1.04	1
Mississippi Choctaw	2,028	4.08%	1.02	1
Hopi	1,530	3.07%	0.77	1
Cheyenne River Sioux	1,449	2.91%	0.73	1
Eastern Cherokee	1,235	2.48%	0.62	1
Rosebud Sioux	1,126	2.26%	0.57	1
Standing Rock Sioux	1,123	2.26%	0.56	
Sisseton Wah. Sioux	784	1.58%	0.39	1
Spirit Lake Sioux	489	0.98%	0.25	
Crow Creek Sioux	408	0.82%	0.20	
Yankton Sioux Tribe of South Dakota	402	0.81%	0.20	
3 Affiliated Tribes	454	0.91%	0.23	
Gila River	874	1.76%	0.44	1
Tohono Odham	759	1.53%	0.38	
White Mountain Apache	1,069	2.15%	0.54	1
Mescalero Apache	490	0.98%	0.25	
Pueblo Laguna	503	1.01%	0.25	1
Pueblo San Felipe	462	0.93%	0.23	
<b>Other Tribes, Specialized School Types, and Tribal Organizations (see criteria below)</b>	11,259	22.63%		5-7
<b>Federal Government (see criteria below)</b>				4-5
<b>TOTAL STUDENTS</b>	49,761			30 - 33
<b>TOTAL TRIBES</b>	242			

As noted in our earlier discussion, convening a fairly balanced and inclusive membership given the diversity of tribes and schools is difficult. As a concrete, numeric example, if some 21 seats are allocated according to the proportionate share approach, 75% of students and their schools would be represented. However, 25% of students served by other tribal schools would not be represented, and some 220 tribes would have no direct representation. While recognizing that no representation approach will resolve this challenge perfectly and given that the size of a

Committee is a limiting factor for practical purposes, we nonetheless recommend creating a committee of 30 to 33 people, with 5 to 7 additional seats for tribes, schools, and tribal organizations, including the kinds of schools that are not covered under the proportionate representation. The goal of this recommendation is to abide by the Congressional mandate, allow for participation by schools and tribes not otherwise represented by the proportionate share of students, and to abide by the FACA and Negotiated Rulemaking Act criteria for creating a balanced and representative group.

For tribes and schools not represented under the proportionate assignment of seats, we suggest that the BIA, in addition to taking nominations under the proportionate approach, also seek nominations from interested tribes for those who are not represented by the suggested 20 to 21 allocated seats by tribes and student enrollment. To the extent possible within these guidelines, we recommend that at least one tribe from each BIA region with a school be represented on the Committee. The Department might set aside 5 to 7 seats and ask for broad nominations from the following parties of individuals that also fit the criteria named in the recommendation above.

- Tribes served by Bureau-funded schools not represented by the Tribes allocated seats according to share of student enrollment.
- Tribes or schools who will help to increase the geographic diversity of representation on the Committee.
- Representatives who will help to increase the diversity of types of schools represented (i.e, Off-reservation boarding schools, dorms, and schools serving multiple tribes)
- Representatives who might be nominated by multiple Tribes and have ability to coordinate and represent a coalition or group of like-minded tribes and schools.
- Representatives of regional or national Indian Education organizations..

Once all nominations were received, the BIA would review the applications for these additional 5 to 7 seats and would seek to select these additional nominees so as to increase representation and balance on the Committee overall.

#### **F. ASSIGN APPROXIMATELY FIVE (5) SEATS TO PROVIDE FOR REPRESENTATION BY THE FEDERAL GOVERNMENT.**

The federal government needs to select its own representatives. While that determination should and will be up to the Department and Bureaus, we recommended that the federal government consider representatives who: 1) represent a mix of the interests of the Office of Facilities Management and Construction, the Bureau of Indian Education, and the BIE-operated schools; 2) represent the interests of Indian education more broadly, especially to link facility and space needs with educational program needs; 3) are knowledgeable about federal rules and regulations; and, 4) are knowledgeable about how the current system of prioritizing and funding school repair, renovation, and construction functions. We estimate that the federal government might need 4 to 5 representatives in total.

#### **G. INTEGRATE THE NEGOTIATED RULEMAKING PROCESS WITH ROBUST TRIBAL AND SCHOOL ENGAGEMENT.**

In order to be effective in Indian Country, given the diversity and independence of many tribes and their schools, we recommend a process that integrates typical negotiated rulemaking with robust and inclusive tribal, school, and other stakeholder engagement. Please note that such a process would be dependent on the funding and budget of the Department and Bureaus. This process would entail significant logistical costs ranging from travel to facilities rental to hosting a national conference. We recommend the following general process steps and summarize the process in the attached chart.

1. *Convene the Committee*: The BIA would convene the Committee as described previously.
2. *Hold the First Committee Meeting*: We suggest the BIA convene a first meeting of the Committee to: 1) review and finalize ground rules; 2) explain the charter and negotiated rulemaking process; 3) review the NCLB charge; 4) develop the initial list of sub-issues that will need to be addressed in the negotiation, and, 5) review and revise the process for a national workshop on these issues.
3. *Sponsor a National Workshop on School Facilities*: We suggest that the BIA, BIE, and the Negotiated Rulemaking Committee jointly sponsor a national workshop on the repair, renovation, and replacement of school facilities. The workshop would allow participation by every school in the system and allow them to provide input on the issues at hand early in the process. The BIA could fund travel and expenses for one representative from each school in the system, as well as the Negotiated Rulemaking Committee members, to participate in the conference in a geographically central location near a hub airport to provide for ease of travel. At this workshop, both plenary and breakout sessions would discuss and offer input on the range of issues raised in this assessment. Ideas for how to improve any number of issues from repair, renovation and new construction funding formulas to project management might be covered, in addition to the specific topics of the regulatory negotiation. This workshop and its proceedings would provide initial detailed input to the Negotiated Rulemaking Committee. In summary, the workshop would seek to: 1) provide the Committee input from every school; 2) allow participants to talk “across the system” about a range of facilities issues and concerns; 3) allow for broad and early participation in the process.
4. *Provide Detailed Briefings on Key Topics*: Comments noted that work was needed to bring all representatives on the Committee up to a shared level of knowledge on essential topics, particularly regarding the current system. Initial meetings of the Committee would need to include presentations on FMIS, the selection/ranking processes used for school renovation, repair, and replacement, and formulas for O&M allocation. Other informational needs may be determined by the group.
5. *Conduct Negotiations*: Once the initial feedback is obtained from the broader universe of schools, the Committee would proceed with its deliberations. The goal would be to uncover the members’ specific interests and concerns, identify both problems and possible solutions, brainstorm ideas and options, prioritize those options, and seek to identify one or a few final, preferred approaches to the formula for prioritizing and funding school repair, renovation, and replacement. This work might take place over several Committee meetings, two or three days in length (since extensive travel will be required, it may make sense to minimize travel

costs by maximizing the time together to do the work). We suggest that the Committee meetings take place in geographically diverse areas each time so that interested Tribes, schools, and other stakeholders can attend and observe, if they wish. Strategies would need to be developed to help educate observers at different meetings about the progress and deliberations of previous meetings. Subcommittees (responsible to the full committee and without final decision-making authority) may also be constituted to make in-depth progress on specific issues.

6. *Sponsor Regional Outreach Workshops on Draft Recommendations:* Once the Committee reaches a consensus on their draft recommendations, or, the final, prioritized options for consideration, the BIA, BIE, and Committee would hold several (4 to 5) regional workshops to obtain feedback from diverse constituents on the draft ideas and/or recommendations. These workshops would again provide opportunities for a larger range of tribes, schools, and stakeholders to participate in and influence the process. Each workshop might be held at a central regional location, be held at times convenient for participants, and involve the Committee presenting its draft findings and recommendations in order to receive comments and feedback. In order to record comments, a meeting summary of the discussions would be prepared and made available to the Committee for review.
7. *Conclude Negotiations.* Upon receipt of the comments and input from the regional workshops, the Negotiated Rulemaking Committee would reconvene to consider the input, deliberate, and seek to reach a final consensus on the regulations governing the funding of school repair, renovation, and replacement across Indian Country. If the Committee reached consensus, the Bureau would then be obligated to commit to promulgating the agreed-upon regulations in the standard, final, formal administrative rulemaking process (i.e., publish draft regulations in the Federal Register, take comments, finalize comments, finalize and promulgate final regulations). If the Committee did not reach consensus on all issues, the BIA could still take the best collective advice of the group and its hard work and incorporate that into its own final draft rule for administrative approval and normal public comment and consultation. Comments requested that, in the case of non-consensus, the BIA commit a transparent process of analysis of all opposing views before making a final decision.

To further enhance broad stakeholder engagement, the Bureau and the Committee may want to consider additional outreach tools. Tools might include, dependent on funding and interest:

- A dedicated website, with the potential to accept and organize comments on the process, draft documents, etc, with links from the BIE website.
- An extensive listserv to keep a broad audience informed of the Committee's work.
- Occasional broadcast-style, structured conference calls that allow for broad participation by interested parties.
- Webcasts of meetings, presentations, or other actions of the Committee
- Other outreach tools to reach tribes and schools without robust electronic access, such as notification of tribal newspapers, and clarity in points of contact for stakeholders to obtain additional information or provide input.

## **H. SUPPORT TRIBAL CONSTITUENCY WORK.**

To the extent possible, we encourage the Bureau to help support outreach and constituency work within tribes and groups of tribes, should they share representatives. Dependent on funding, the Bureau might support a modest travel budget for each Committee member to conduct outreach efforts to Tribal Councils, school boards, school staff, and other appropriate stakeholders within a constituency. The representative might be asked to file a short report outlining who they updated, on what topic, along with their travel reimbursements. This kind of modest travel budget would probably be limited to driving, not more expensive airline flights, but would support and encourage representatives to do active outreach to their constituents. Comments noted that this recommendation would not fully provide for the needs of remote tribes.